the latter. Not being consensual or promissory, but lying in grant, conveyances and trusts are not contractual in their nature or obligations. One person alone may make a binding trust, but a contract promissory in nature must rest upon the agreement and mutual assent of parties. A conveyance or trust may be by way of gift as well as in pursuance of a contract. All the parties thereto may terminate a contract at will, but a settlor or grantor has, as seen above, placed the property beyond his control. A defaulting trustee will be removed and another substituted, but courts do not alter the terms or parties to a contract, nor upon breach substitute new parties thereto. A trustee may apply to a court for explanation, advice or approval, but no court will tell a petitioner what he himself intended or promised in his own contract. A contract creates contracting parties; a conveyance the relationship of grantor and grantee; trusts, trustee and cestui. Each of these different relationships has its own appropriate rights and remedies.[30] While the trust or conveyance may arise out of a contract, its execution ushers in a new relationship, the rights and liabilities of which succeed to those of the contract.

A. W. B.

WILLS: REPUBLICATION: PRETERMITTED HEIR.—By will a testatrix left ten dollars to one of her daughters. A codicil substantially confirmed the will. In the interval between the execution of the will and the codicil, the daughter died, leaving a son who had not been named in his grandmother's will. In the *Estate of Matthews*[1] the Supreme Court of California held that this grandson was a pretermitted heir under section 1307 of the Civil Code of California.[2] This conclusion was reached by the application of two principles: first, that a codicil republishes the will as of the date of the codicil; and second, that a devise or bequest to a person dead at the date of the execution of the will is void and does not pass to his heirs by the provisions of section 1310 of the Civil Code.[3] Following these principles, the grandson could not inherit the ten dollars bequeathed to his mother by the testatrix (his grandmother), and therefore was a pretermitted heir.

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[30] For the idea of relationship in our law see article by Prof. Pound, Law as Developed in Juristic Thought, 30 Harvard Law Review, 210, 213.

[1] (November 30, 1917), 54 Cal. Dec., 169 Pac. 233.

[2] "When any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child has the same share in the estate of the testator as if he had died intestate and succeeds thereto."

[3] "When any estate is devised or bequeathed to any child or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will. . . ."

The rule that a codicil republishes a will as of the date of the codicil has been expressly laid down in more than one instance by the California courts[4] and is old in the history of the common law.[5] To this rule there are some exceptions. In the Estate of McCauley, the Supreme Court of California held that a devise to charity which was made more than thirty days before the death of the testator was not rendered invalid because of a codicil made within thirty days before death.[6] In interpreting section 1287 of the Civil Code (that the execution of a codicil republishes the will as modified by the codicil), the court declared that that section must be construed with the other sections relating to the subject of wills so as to preserve the letter and the spirit of all the provisions of the statute as far as possible. "The section should have such constrution," the court said further, "if it is possible in reason to do so, as will carry out the known intention of the testator . . . . For some purposes, no doubt, the will speaks from the date of the codicil, but this is true only so far as the codicil requires that it should so speak. . . . . To construe the statute as is contended for . . . . is to leave a large part of the estate undisposed of, as well as to defeat the object of the testatrix." On the same reasoning as that in the Estate of McCauley, a clause giving the residue of an estate to the legatees does not entitle special legatees added in the codicil to claim a share of the residue,[7] and where legacies are given to the testator's children but are adeemed by the testator during his life, a codicil will not revive the legacy and prevent the ademption.[8] While no cases have been found where merely the death of a legatee was held a reason for construing the will and the codicil as of different dates, still, in the Estate of Matthews, construing the will and the codicil as of the same date did defeat the manifest intention of the testatrix to cut off one of her children with a pittance. The court, however, after considering the Estate of McCauley, refused to apply the reason-

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[4] In Payne v. Payne (1861), 18 Cal. 291, the court said, "The codicil refers to the will and operates as its republication and the two are to be regarded as forming but one instrument, speaking from the date of the codicil." In Estate of Hayne (1913), 165 Cal. 568 at 572, 133 Pac. 277, the rule was stated: "Its legal effect is the same as if the entire will with the changes made by the codicil had been executed on April 18, 1907 (the date of the codicil)." Similarly, In re Ladd (1892), 94 Cal. 670: "The whole of the original will and the codicil are to be construed as of a single instrument executed at the date of the codicil."

[5] Becford v. Parnicott (1591), Cro. El. 493; Barnes v. Crow (1792), 4 B. C. C. 2.

[6] (1903), 138 Cal. 432, 71 Pac. 512. See also Carl's Appeal (1884), 106 Pa. St. 635.

[7] Alsop's Appeal (1848), 9 Pa. St. 374.

[8] Izard v. Hurst (1698), Freem. ch. 224, 22 Eng. Rep. R. 1173; Paine v. Parsons (1833), 14 Pick. 318; Montague v. Montague (1852), 15 Beav. 564, 51 Eng. Rep. R. 657; Cowper v. Mantel (1856), 22 Beav. 223, 52 Eng. Rep. R. 1094.

ing of that case to the Estate of Matthews, holding that the testatrix must have known that the legacy to her dead daughter would not pass to the daughter's son and that, as to that son, she (the testatrix) wished to die intestate. The dissenting opinion of Justices Shaw and Sloss would apply the rule of Estate of McCauley to the principal case.

Even granting that the will and the codicil, construed as of the date of the codicil, gave a legacy to a dead woman, did this legacy pass to the grandson? If so, he was not a pretermitted heir. A legacy to a person dead at the date of the will was absolutely void at common law and did not pass to the legatee's issue.[9] Even a specific legacy or devise to A with the provision that A's children should inherit, if A died during the testator's life, did not pass to A's children, if A was dead at the date of the will,[10] though if A died after the execution of the will they could inherit. Many of the American states have provided by statute that a gift to a blood relative shall not lapse if the legatee or devisee leaves lineal descendants.[11] Some courts have held that, liberally interpreting the reason and spirit of such a statute, it makes no difference whether the legatee died before or after making of the will and that in both cases the lineal descendant inherits,[12] but the contrary view is asserted in several jurisdictions on the theory that descendants can never claim a right through an ancestor, when that ancestor never at any time in his own life had any rights to which his descendants could be substituted.[13] The reasoning in an earlier case before the Supreme Court of California would support the latter view,[14] though the question was never directly in issue until the Estate of Matthews arose. The rule seems artificial and, when combined with the rule as to the effect of a codicil on the date of the will, has brought about a surprising result. While the decision may not have caused an injustice in the particular case, the principles laid down may sometime operate most unjustly to defeat the whole purpose of a will. The case serves as a warning to a testator of the dangers attendant upon making codicils.

E. B. P.

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[9] Dildine v. Dildine (1880), 32 N. J. Eq. 78; Doe v. Roe (1861), 4 Houst. 20; Billingsley v. Tongue (1856), 9 Md. 575; Moss v. Helsley (1883), 60 Tex. 426.

[10] Christopherson v. Naylor (1816), 1 Mer. 321, 35 Eng. Rep. R. 693; Gray v. Garman (1843), 2 Hare 267, 67 Eng. Rep. R. 111; In re Musther (1889), 43 Ch. Div. 569; In re Chinery (1888), 39 Ch. Div. 614; Hotchkisses' Trusts (1860), L. R. 8 Eq. 643.

[11] Cf. Cal. Civ. Code, § 1310, quoted supra, n. 2.

[12] Bray v. Pullen (1892), 84 Me. 182, 24 Atl. 811; Weldberger v. Cheek's Executors (1897), 94 Va. 517, 27 S. E. 441.

[13] Almy v. Jones (1891), 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414; Scales v. Scales (1860), 59 N. C. 172; Billingsley v. Tongue (1856), supra, n. 11; Twitty v. Martin (1884), 94 N. C. 646.

[14] Ex parte Ross (1903), 140 Cal. 282, 73 Pac. 976.